SUPREME COURT, U. S.

1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 992.

NEW YORK FEED CO., Inc., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998.

MILKY WAY PRODUCTIONS, Inc., JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

Brief of Appellants, Milky Way Productions, Inc., and New York Feed Co., Inc., in Opposition to Motions to Dismiss or Affirm.

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THE RECORD COMPANY, Inc., New York, N. Y. 10007—212 732-6978—1970

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In the

Supreme Court of the State of New York

October Term, 1969.

No. 992

New York Feed Co., Inc., and Stephen Heller,

Appellants,

against

Howard R. Leary and Frank S. Hogan,

Appellees.

No. 998

Milky Way Productions, Inc., James Buckley, and Al Goldstein,

Appellants,

against

Howard R. Leary and Frank S. Hogan,

Appellees.

Brief of Appellants, Milky Way Productions, Inc., and New York Feed Co., Inc., in Opposition to Motions of Appellees to Dismiss or Affirm.

I. The Procedural Arrest Warrant Statutes, C.C.P. 148-150, are unconstitutional as applied in law to borderline publications.

(Appellant Milky Way's Jurisdictional Statement Point II.)

On Monday, February 16, 1970, five months after the motions were made, the Criminal Court, New York County, rendered its decision on the motions of defendants Jim Buckley and Al Goldstein, principals of Milky Way Productions, Inc., publishers of Screw, The Sex Review, and the companion motions of Stephen Heller and Sam Edwards, the principals of New York Feed Co., Inc., publishers of the New York Review of Sex.

The Criminal Court rendered no opinion. The court denied Screw's motion to dismiss and a trial date was fixed, but held the two issues of the New York Review of Sex were not obscene. The court also without opinion denied motions that the New York statute was unconstitutional as overbroad (Point I of appellant Milky Way's jurisdictional statement) and that the arrest warrant statutes as applied as a matter of law were unconstitutional (Point II of appellant Milky Way's jurisdictional statement).

The New York Review of Sex, a relative newcomer to the field, should be pleased at being declared not obscene on motion. There is only one problem: The arrest warrant statutes as applied as a matter of law on the undisputed facts, as set forth in appellant Milky Way's jurisdictional statement, totally destroyed the publication and put it out of business, even though it was not obscene. Exactly what we said would happen did happen.

Appellees do not question any part of our statement of facts, or that upon the issuance of the warrant:

1. The publication issue which is the subject of the warrant becomes contraband, is deemed illegal, and obscene, and hundreds or thousands of copies of that issue will not be sold by anyone.

2. Newsdealers will not sell subsequent issues, by the thousands.

3. When repeated, the publication itself is destroyed, which is exactly what happened to the New York Review of Sex, and will happen to Screw, long before Screw can fight out the legal issues via the state courts. The very danger envisaged by *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964), happened, a nonobscene publication was suppressed and destroyed by *ex parte* judicial ruling procedures.

On October 9, 1969, still another federal district court held there could be no criminal prosecutions unless "it is preceded by an adversary hearing with full notice to defendant." *Drive In Theatres, Inc., v. Huskey*, 305 F. Supp. 1232, 1236 (W.D. No. Car. Oct. 9, 1969).

This legal issue is properly the subject of a three-judge court. Appellants do not complain just about the particular arrests, or the words of the statute, or how it might be applied, but how it was, is and will be applied as a matter of law. Enjoining the operation of a state statute historically was the reason for requiring three judges.

Appellants have standing. While appellants complain about arrests of newsdealers without any warrants for their arrests, it is appellants' newspaper issues which become contraband and are suppressed upon the *ex parte* judicial ruling.

The legal issues here involved go far beyond obscenity laws. Long after arguments over obscenity have passed into ancient history, if the lower court decision is not reversed, there will be embedded in the body of American jurisprudence one of the most vicious and pernicious procedural precedents which has ever threatened First Amendment rights. Today it is a publication which borders on obscenity; tomorrow it will be a publication bordering on some other illegality.

II. Penal Law, Section 235.00(1), is overbroad.

(Appellant Milky Way's Jurisdictional Statement Point I.)

In *United States of America, plaintiff; v. Thirty-Seven (37) Photographs, defendants, Milton Luros, claimant,* F. Supp. (C.D. Calif. Jan 27, 1970 Civil 69-2242-F) (three-judge court), Luros, claimant, had imported 37 photographs, hard-core, admittedly for *commercial* distribution. The three-judge California district court, based on *Stanley v. Georgia*, 394 U. S. 557 (1969), and citing *Karalexis v. Byrne*, F. Supp. (D. Mass. Nov. 28, 1969 Civil 69-665-J), directed customs officials to "deliver such photographs to the claimant," and held 19 U. S. C. 1305 unconstitutional.

While the case dealt with the federal import statute, it supports appellants' position (Point I appellant Milky Way's jurisdictional statement).

This memorandum of law will be printed. Appellees' motion should be denied.

Respectfully submitted,

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